



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: South Coast Terminals, Inc.

File: B-256593; B-256608

Date: April 4, 1994

DECISION

South Coast Terminals, Inc. protests the awards of contracts to Valvoline, Inc., a subsidiary of Ashland Oil Inc., under requests for proposals (RFP) Nos. SPO451-94-R-0917 (RFP-0917), issued on December 30, 1993, and SPO451-94-R-0532 (RFP-0532), issued on December 23, 1993, by the Defense General Supply Center, Defense Logistics Agency, for stated incremental quantities of 10W engine lubricating oil. The closing date for RFP-0917 was February 1, 1994, and the closing date for RFP-0532 was February 4, 1994. Both RFPs (in Section B, bid schedule) required that an offeror's product be approved in accordance with military specification No. MIL-L-2104E, dated August 1, 1988, and amended May 26, 1989, and appear on the qualified products list (QPL) in order for the offeror to be eligible for award.

The record shows that in April 1991, the qualification of the protester's product under MIL-L-2104E expired, and the protester's product was deleted from the QPL. In March 1992, MIL-L-2104E was superseded by military specification No. MIL-L-2104F. In January 1994, the protester submitted offers under the above-referenced RFPs based on a "product to be qualified under [MIL-L-2104F] . . . since [MIL-L-2104E] has been superseded and our previous approval has expired." Several other firms, including Valvoline, also submitted offers under both RFPs. On February 24, 1994, for RFP-0917, and on February 28, 1994, for RFP-0532, and in accordance with the terms of the RFPs, the agency awarded contracts to Valvoline, the only firm with a product on the QPL under MIL-L-2104E. In early March 1994, following the awards, the protester filed these protests.

The protester contends that since MIL-L-2104E was superseded by MIL-L-2104F, the RFPs should have required that for an offeror to be eligible for award, its product had to comply with the most current military specification, MIL-L-2104F. The protester states that had it been advised that the superseded military specification, MIL-L-2104E, was to be used as the basis for awarding the contracts, it would not have submitted offers. The protester points out that while these procurements were pending, approval of its product under MIL-L-2104F was in progress and, in fact, its product was approved for inclusion on the QPL under MIL-L-2104F prior to the awards being made to Valvoline.

We dismiss this argument as untimely because it challenges an alleged impropriety in the solicitations that should have been protested before the initial closing dates for submission of offers.

Our Bid Protest Regulations contain strict rules requiring timely submission of protests. These rules specifically require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing time. 4 C.F.R. § 21.2(a)(1) (1993); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324.

Here, the RFPs (in Section B, bid schedule) clearly required that an offeror's product comply with MIL-L-2104E and be included on the QPL. Since the protester believed that the RFPs should have required product compliance under MIL-L-2104F, instead of MIL-L-2104E, it should have protested this matter prior to the February 1994 closing dates. Therefore, the protester's post-award protests concerning the military specification included in the RFPs are clearly untimely.

We point out that consistent with the terms of the RFPs, the agency properly made the awards to Valvoline, the only firm which had a product on the QPL under MIL-L-2104E. Although the protester believes that it should have been awarded the contracts since its product received approval under MIL-L-2104F, the most current military specification, any awards to an offeror with a product complying with MIL-L-2104F, instead of MIL-L-2104E, would have been inconsistent with the terms of the RFPs.

The protester also contends that the agency acted in a "discriminatory" manner in granting a waiver to Valvoline so that its product could remain on the QPL under MIL-L-2104E, while not giving the same opportunity to other firms like itself.

The record shows that in 1991, during the transition from MIL-L-2104E to MIL-L-2104F, the protester's approval under MIL-L-2104E expired and its product was deleted from the QPL. At the same time, Valvoline installed a hydrofinishing unit to reduce the sulfur content of the base oils used in its product. Since this constituted a change in Valvoline's manufacturing/refining process, Valvoline notified the agency and requested a waiver so that the firm could use base oils processed with the hydrofinishing unit until product retesting could be completed under MIL-L-2104E and so that its product could remain on the QPL. The agency granted a waiver, which was subsequently renewed, to Valvoline. Valvoline's product, therefore, continuously remained on the QPL under MIL-L-2104E. The agency reports that the change in Valvoline's manufacturing/refining process did not invalidate the qualification of the firm's product under MIL-L-2104E and that the agency would have granted a waiver to any other firm under similar circumstances.

On this record, we conclude that the agency did not act in a discriminatory manner in granting a waiver to Valvoline. Unlike the protester, which allowed its product's qualification under MIL-L-2104E to expire in 1991, Valvoline was the only firm which took any affirmative steps to ensure that its product remained qualified under this military specification and on the QPL. In this regard, Valvoline had a product listed on the QPL under MIL-L-2104E for which the manufacturing/refining process had changed. The agency waived the product retesting requirement in order to keep Valvoline's currently qualified product on the QPL.¹ This was not a case where the agency waived a requirement and approved a previously unqualified product without any initial testing. Moreover, it appears from the record that had the protester's qualification not expired and had its product currently been listed on the QPL under MIL-L-2104E, it would have been eligible for a waiver had its manufacturing/refining process also changed. Since the protester's qualification under MIL-L-2104E expired, and the firm never requested that its product be relisted on the QPL

¹Retesting, which was initially planned, was canceled due in part to the revision of the military specification.

under this military specification, we see no basis for it to complain that it was treated unfairly compared to Valvoline which chose to maintain its QPL eligibility.

The protests are dismissed.

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²Pursuant to the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d)(2) (1988), the agency made the determinations that urgent and compelling circumstances significantly affecting the interests of the United States mandated the continuation of contract performance notwithstanding these protests. The protester received a copy of the agency's determinations and findings and does not challenge the agency's urgency determinations. In fact, the protester recognized the urgent need for these requirements.